

1 JBEJUSHC

2 Conference

3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF NEW YORK5 -----x  
6 ARTHUR USHERSON,

7 Plaintiff,

8 v.

9 19 Civ. 6368 JMF

10 BANDSHELL ARTIST MANAGEMENT,

11 Defendant.

12 -----x

13 November 14, 2019  
14 4:00 p.m.

15 Before:

16 HON. JESSE M. FURMAN,

17 APPEARANCES  
18 District Judge19 LIEBOWITZ LAW FIRM, PLLC  
20 Attorneys for plaintiff  
21 BY: RICHARD LIEBOWITZ, Esq.  
22 JAMES FREEMAN, Esq.  
23 Of counsel24  
25 McGuire Woods, LLP  
26 Attorneys for defendant  
27 BY: BRAD RICHARD NEWBERG, Esq.  
28 Of counsel

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1                   Now, you know, whether or not they made money off of  
2 it, you know, I don't think is, you know, such, you know -- it  
3 may be one factor of a defense, but the only two factors you  
4 need is it is registered with the copyright office and they  
5 copied the photograph. Now, I don't believe defendants are  
6 disputing that they copied the photograph, and I think  
7 ultimately this is a case regarding damages.

8                   What is the appropriate statutory damages for an  
9 iconic photograph of singer-songwriter Leon Redbone?

10                  THE COURT: A photograph that never before had been  
11 licensed?

12                  MR. LIEBOWITZ: Yes. Just because it wasn't licensed  
13 before doesn't mean that he's not entitled to a licensing fee.

14                  THE COURT: Doesn't the licensing history factor  
15 heavily into what the appropriate licensing fee brings,  
16 statutory damages would be?

17                  MR. LIEBOWITZ: Yes. That is the reason for statutory  
18 damages. If the statutory damages exist because if there is no  
19 actual damages because here if there is no licensing, then the  
20 Courts would look at okay, the range is between 750 and  
21 150,000, where in the spectrum it should be. That is the  
22 purpose of the statutory damages. Not only if there is no  
23 actual damages, what about deterrence? Is defendant going to  
24 keep on using the photographs without permission?

25                  What about, you know, a license? What about photo

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1 credit? There has to be some deterrence because they will  
2 continue to do it. I strongly believe that is the reason for  
3 statutory damages.

4 Here if there is no licensing fee, we are going to  
5 have other factors going to statutory damages like the  
6 willfulness. Why license? We want to find out a history of  
7 other licenses from the defendant, how they licensed  
8 photographs of other people before and what they charged for  
9 that amount. I think this case comes down to damages, and we  
10 need to determine all of these things during discovery to find  
11 out what an appropriate number is.

12 THE COURT: Well, I don't know if it comes down to  
13 damages or not, but maybe a fair use argument as well. If it  
14 does come down to damages, I must say it is not clear to me  
15 that it would lead to anything short of the low end of the  
16 statutory damages award, which makes me think discovery  
17 shouldn't be the tail that wags the dog in this case.

18 MR. LIEBOWITZ: Your Honor, at the mediation and say  
19 zero dollars. You know, it is worth something. The statute  
20 has a minimum of 750 to 150,000.

21 THE COURT: Mr. Liebowitz, do you think you're getting  
22 150,000?

23 MR. LIEBOWITZ: No, no, your Honor.

24 All I am saying is at the mediation when they offered  
25 zero dollars, that's bad faith. We were negotiating a

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1 settlement. We got a number the day before. This case should  
2 have been done weeks ago, and we tried to resolve the matter  
3 without coming here today, and we tried doing that, but the  
4 defendants take the position that they're trolling for  
5 sanctions, trying to make money off of this, and we are open to  
6 settlement, the same number we discussed before the mediation.  
7 If they didn't agree to the terms, we could have worked it out.

8 I am still hopeful and truly hope that defendant, in  
9 good faith after this, we can go outside and try to discuss a  
10 resolution so that we could resolve the case and move on.

11 THE COURT: All right. Even if you resolve the case,  
12 as you know full well, with your history with me, that doesn't  
13 necessarily resolve the sanctions if I decide to proceed with  
14 that. Be that as it may, my inclination is given the amount in  
15 controversy or likely to be in controversy here, we should  
16 severely limit the discovery, and I wonder if you need, either  
17 side needs more than one deposition.

18 Your positions on that?

19 MR. LIEBOWITZ: I believe that whoever posted the  
20 photograph, if it was more than one person, we need to get one  
21 or two people and then defendant's corporate representative.

22 THE COURT: Mr. Newberg?

23 MR. NEWBERG: The person involved, it is the same as  
24 our corporate representative. So it would be the individual,  
25 30 (b) (6), the same day. I do not know at this point that we